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U. S. DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

Nos. 706 AND 707

*In the Supreme Court of the United States*

OCTOBER TERM, 1927.

ESSEGE COMPANY OF CHINA AND DAVID SCHRATTER

v.  
UNITED STATES OF AMERICA

HANCLAIRE TRADING CORPORATION AND DAVID  
SCHRATTER

v.  
UNITED STATES OF AMERICA

APPEAL FROM AND IN ERROR TO THE DISTRICT COURT OF  
THE UNITED STATES FOR THE SOUTHERN DISTRICT  
OF NEW YORK

BRIEF FOR THE UNITED STATES

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NEW YORK.*

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## BRIEF FOR THE UNITED STATES.

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### STATEMENT OF THE CASES.

The Essgee Company of China and the Hanclore Trading Corporation filed petitions in the District Court of the United States for the Southern District of New York, asking for the return of certain books and papers then in the possession of the United States attorney for the Southern District of New York. (R., p. 13-38.) David Schratter, an officer of both corporations, joined in both petitions.

On September 12, 1922, the district court dismissed the petitions (R., p. 2) and the cases are brought here by appeal and writ of error (R., pp. 10-12).

In the briefs filed on behalf of the appellants the facts upon which the said petitions were based are set forth at length, but, unfortunately, with some bias, and it is therefore deemed necessary to restate the facts herein, as disclosed by the record and particularly by the opinion of the court below.

On October 14, 1921, Edward R. Norwood, a customs agent, deputized by the marshal for that purpose, served two subpoenas duces tecum (R., pp. 52-58) directed to the two corporations upon David Schratter, an officer of both corporations, at the office where the said concerns carried on business. The grand jury was then investigating an alleged violation of the customs laws, act of October 3, 1913, paragraph G, section 3 (38 Stat. 183) (R., p. 55).

A joint indictment charging a violation of the above statute was returned against both corporations and David Schratter during the May, 1922, term of the district court. (R., pp. 15, 26, 91.) Kramer was not indicted. (R., p. 32.)

At the time of effecting service of the subpoenas Norwood was accompanied by Acting Deputy Collector of Customs Williams and Customs Agents Dow and Neustadt (R., pp. 43, 52, 54). The story from this point on may be told in the words of District Judge Knox (R., p. 90):

In response to the subpoenas, or at least to one of them, certain papers were gathered

together by one Kramer, vice president of the Hanclore Trading Company, in the presence of Schratter, and were taken by Kramer, accompanied by Schratter and two Government officials, to the anteroom of the grand jury, which was then in session in the Federal courthouse, in this district.

Arriving there, neither Kramer or Schratter was invited before the grand jury; the papers were deposited upon a table in the anteroom; or, at the request of one of the aforesaid officials, were left in his custody. At about this time, the assistant United States attorney, in charge of this prosecution, emerged from the grand jury room, and taking the papers into his possession carried them before the grand jury, where some of them were ordered impounded.

Meanwhile, Kramer and Schratter were directed to go to another part of the Federal building, and, having done so, were informed that warrants had been issued for their arrest for alleged offenses against the customs laws. The two men were subsequently arraigned before United States Commissioner Hitchcock, where they waived examination and were admitted to bail.

On the following day (October 15) David Schratter, over the objection of the United States attorney, obtained leave of court to go to Europe, where he remained until June 9, 1922 (R., p. 91). During the time Schratter was abroad Kramer testified before the grand jury (R., pp. 32, 40, 83), and at that time voluntarily gave to the United States attorney certain papers which are described by him (R., p. 83) as

"certificates for shares of capital stock of Essgee Company of China, unpaid drafts which belonged to deponent, and also papers which corroborated deponent's contention that deponent was a creditor of David Schratter and Hanclore Trading Corporation."

The records and briefs filed by the appellants deal at great length with their right to the return of certain other papers the property of the two corporations (R., pp. 46-49) which were taken from their office on October 14, 1921, by Messrs. Williams and Neustadt, shortly after the departure of Schratter and Kramer for the Federal building. The district court found that such papers were taken with the consent of Schratter and Kramer (R., pp. 93, 94), stating that its decision would be reviewed at the trial of the criminal action. The Government contends that these papers were returned at the request of Kramer on October 19, 1921 (R., p. 72). This would seem to be admitted by the appellants. At page 87 of the record Schratter says, under oath:

*The papers which the Government now has are, therefore, the papers which deponent and Mr. Kramer produced pursuant to the command of the subpoena duly served.*

This admission is again made on page 16, of the brief filed on behalf of Hanclore Trading Corporation, where it is stated:

We will limit our demands to the books, invoices, and papers which the United States attorney took, because as to those papers, invoices, and books there is no dispute of fact.

As to the papers removed by the customs agents after the departure of Schratter and Kramer (R., pp. 46-49), the order of the district court is interlocutory (R., pp. 3, 93-95).

The record is barren of an affidavit from Customs Agent Neustadt, for the reason that at the time these proceedings were instituted he was abroad in Germany as a Treasury attaché. (R., p. 49.)

In the records the term "private invoices" is used to describe some of the papers produced in obedience to the subpœnas. It is not intended by this phrase to convey the idea that there was any title in the individuals to those invoices or that they pertained to their personal affairs. It is simply used to describe invoices which were transmitted by the shipper abroad to the corporations in this country privately, i. e., they were not made part of the entries filed at the New York Customs house at the time the goods mentioned therein were brought into the United States. The prices of the merchandise listed on the "private invoices" were higher than those filed with the entries. (R., p. 45.)

#### QUESTIONS INVOLVED.

The assignments of error herein (R., pp. 4-6) are predicated upon violations of the fourth and fifth amendments, in that both the corporations and Schratter have been subject to an unreasonable search and seizure and have been and will be compelled in a criminal case to be witnesses against themselves.

## ARGUMENT.

## I.

The order of the district court denying the application for the return of the books, etc., is in its nature interlocutory and not reviewable.

*Alexander v. United States*, 201 U. S. 117.

*Coastwise Lumber & Supply Co. v. United States*, 259 Fed. 847.

*United States v. Maresca*, 266 Fed. 713.

*United States v. Marquette*, 270 Fed. 214.

*In re Weinstein*, 271 Fed. 5.

*Murray v. United States*, 273 Fed. 522.

The cases at bar are readily distinguishable from *Burdeau v. McDowell*, 256 U. S. 465, and *Perlman v. United States*, 247 U. S. 7, in that in those cases no criminal actions were pending. The proceedings were entirely independent and the orders, therefore, were essentially final. But here, while appellants have entitled their motions for the recapture of the books and papers as separate proceedings, yet there are criminal actions pending and their motions upon examination lose whatever independent character they may have had and are seen to be but steps in the criminal actions.

There is a lack of jurisdiction disclosed by the record, and this court will not review the orders of the district court.

## II.

**No right of David Schratter is involved in this matter.**

Where the books and papers of a corporation are produced in a judicial proceeding at the instance of the Government, the officers of such corporation

have no rights either against unreasonable search and seizure or under the evidence clause in the fifth amendment.

*Grant v. United States*, 227 U. S. 74.

*Wheeler v. United States*, 226 U. S. 478.

*Hale v. Henkel*, 201 U. S. 43.

*Wilson v. United States*, 221 U. S. 361.

In the cases at bar the papers produced in response to the subpoenas included the personal tax assessment for Morris Schratter and David Schratter by the city of New York for the year 1922. (R., p. 80.) It was not called for by the Government, is of no moment, and is entirely irrelevant to the prosecution. The Government stands ready and willing to return it. No other papers belonging to David Schratter are in the possession of the Government.

An answer to the statement that Schratter's books, records, and papers were seized, which if predicated upon the presence of the tax assessment, is to be found in the opinion of this court in *Johnson v. United States*, 228 U. S. 457, wherein it is held that while an individual is privileged from producing his papers, books, and records, nevertheless he is not privileged from their production by a third party. This is precisely the case here. The assessment was produced by the corporation wholly inadvertently. Had it been noticed on October 19, 1921, when Williams returned certain papers to the appellants, it would likewise have been returned.

## III.

The production of the corporate books and papers by means of the subpœnas duces tecum did not violate the fourth amendment, either as to the corporation or its officers.

*Grant v. United States*, supra.

*Wheeler v. United States*, supra.

*Dreier v. United States*, 221 U. S. 394.

*Wilson v. United States*, supra.

*Hale v. Henkel*, supra.

The scope of the subpœnas in these cases was reasonable. In the leading case of *Hale v. Henkel*, supra, the court held that the subpœna was far too sweeping in its terms to be reasonable. The contracts sought to be subpœnaed in that case were not limited to those made with a particular corporation, nor were the other writings and documents in any wise limited. It required the production of all understandings, contracts, or correspondence between the MacAndrews & Forbes Company, and no less than six different companies, as well as reports made and accounts rendered by such companies from the date of the organization of the MacAndrews & Forbes Company, and all letters received by the company since its organization from more than a dozen different companies, situated in seven different States.

The subpœnas in the cases at bar, however, have none of the vices denounced in the *Henkel* case. They were specific in describing the books to be produced. The contracts and other writings are limited to the corporations named in the subpœnas and in each

instance the time is specified covering the particular books and records.

The subpoenas were drawn so that the investigation by the grand jury might cover the various ways by which an offense under the statute (R., p. 55) might be committed. That statute reads as follows:

G. That if any consignor, seller, owner, importer, consignee, agent, or other person or persons, shall enter or introduce, or attempt to enter or introduce, into the commerce of the United States any imported merchandise by means of any fraudulent or false invoice, declaration, affidavit, letter, paper, or by means of any false statement, written or verbal, or by means of any false or fraudulent practice or appliance whatsoever, or shall make any false statement in the declarations provided for in paragraph F without reasonable cause to believe the truth of such statement, or shall aid or procure the making of any such false statement as to any matter material thereto without reasonable cause to believe the truth of such statement, or shall be guilty of any willful act or omission by means whereof the United States shall or may be deprived of the lawful duties, or any portion thereof, accruing upon the merchandise, or any portion thereof, embraced or referred to in such invoice, declaration, affidavit, letter, paper, or statement, or affected by such act or omission, such person or persons shall upon conviction be fined for each offense a sum not exceeding \$5,000, or be imprisoned for a time

not exceeding two years, or both, in the discretion of the court: *Provided*, That nothing in this section shall be construed to relieve imported merchandise from forfeiture by reason of such false statement or for any cause elsewhere provided by law.

In two instances the subpœnas call for records from January, 1915, to October, 1921. (R., pp. 56, 57, 58.) The statute of limitations applicable to the offense under investigation by the grand jury is five years. Revised Statutes, section 1046. The requirement was not unreasonable.

*Heike v. United States*, 227 U. S. 131.

The subpœnas being reasonable in every particular, there was no unreasonable search and seizure.

*Wheeler v. United States*, supra, at page 489.

*Wilson v. United States*, supra, at page 376.

*Consolidated Rendering Co. v. Vermont*, 207 U. S. 541, 554.

*United States v. Watson*, 266 Fed. 736.

*Hale v. Henkel*, supra.

*Norcross v. United States*, 209 Fed. 13.

*In re American Sugar Refining Co.*, 178 Fed. 109.

*Santa Fe Pac. R. R. Co. v. Davidson*, 149 Fed. 603.

*United States v. American Tobacco Co.*, 146 Fed. 557.

## IV.

**The corporations are not privileged against the use of their books in a criminal prosecution.**

The decisions of this court are conclusive that a corporation, when required to produce its books at the instance of the Government, may not plead an immunity against self-incrimination. Nor may an officer of a corporation refuse to produce its books on the ground that to do so would incriminate him. The books and papers of Essgee Company of China and Hanchaire Trading Corporation were not privileged from production on the ground that they would incriminate the corporations or the officers thereof.

*Hale v. Henkel*, supra.

*Wilson v. United States*, supra.

## V.

**If appellants ever had a right to object to the production of the books, it has been waived.**

The evidence is in conflict as to just how and when the assistant United States attorney took physical possession of the papers. (R., pp. 30, 77, 78.) Judge Knox found that (R., p. 90) —

the papers were deposited upon a table in the anteroom, or, at the request of one of the aforesaid officials (Customs Agents Norwood or Dow) were left in his custody. At about this time the assistant United States attorney, in charge of this prosecution, emerged from the grand jury room, and taking the papers

into his possession, carried them before the grand jury, where some of them were ordered impounded.

*In re District Attorney of the United States*, Fed. Cas. 3925; 7 Fed. Cas. 745, the court in defining the duties of the district attorney with respect to the grand jury, stated that it was part of his duty to lay before that body all the evidence officially in his hands.

In *Wertheim v. Continental Ry. & Trust Co.*, 15 Fed. 716, 727, cited with approval in *Wilson v. United States*, supra, it is stated that the witness served with a subpœna *duces tecum* may be required to make a return to the writ before the case is opened.

So in the case at bar, the most that can be said is that the district attorney emerged from the grand jury room to the anteroom where Schratter and Kramer had just arrived with the records subpœnaed and carried them before the grand jury where some of them were ordered impounded. To argue that such action was an illegal seizure is no argument at all, because it assumes the very duty of the district attorney.

On page 21 of the Hanclore brief it is stated that *Hale v. Henkel*, supra, is authority for the doctrine that one served with a subpœna has an inherent right to challenge its sufficiency and have the judgment of the court upon his challenge before the subpœna is finally enforced. We are unable to draw any such inference from the Henkel case, and

appellant's contention is not substantiated by the accepted practice. The universal practice in cases where it is felt a subpoena is defective is to move to quash or to refuse the command and await a trial of the issue in the resulting proceeding for contempt. In *Wilson v. United States*, supra, the court holds at page 372 that where papers are produced in response to a subpoena *duces tecum* directed to a corporation it is not necessary to have the person producing the documents sworn as a witness.

In this connection it is to be particularly noted that the subpoenas were directed to the corporations. Schratter was never enticed, solicited, requested, or subpoenaed to come to the Federal building. (R., pp. 55, 75, 90.) The subpoenas were answered by the responsible officer of the corporations, but it is submitted that answer to the subpoenas could as well have been made by dispatching the books and papers requested by means of a clerk or other employee of the corporations.

If Schratter upon presenting himself at the Federal building in response to the subpoenas had then been called before the grand jury, he could have asserted his individual constitutional rights. But he was not thus called, and therefore his constitutional rights were never called into question and it must follow that he never waived them.

The Government was implored to permit Schratter and Kramer to testify before the grand jury. (Exhibit A, R., pp. 40, 42.) Kramer was accorded this

privilege, and "in the course of his testimony voluntarily produced certain papers and documents which, the record indicates, had an important bearing upon his prosecution." (Opinion of the district court, R., p. 92.)

It thus appears that the corporations, in the person of their attorney, who was an officer of one of them, were permitted not only to challenge the subpoenas but to testify before the grand jury, and that no objection to the production or use of the papers was made. The right to challenge the subpoenas was accorded the appellants, and by their failure to assert it they must be held to have waived their privilege.

The appellants, by their long acquiescence in the use of the papers, and now that an indictment is pending in this case, must be held to have waived any right to the return of the papers here demanded.

In *Dreier v. United States*, 221 U. S. 394, *supra*, the Government contended that there had been a waiver, but the court found it unnecessary to decide the question. The situation is analogous to the case where a witness testifies in part to a transaction with which he was criminally concerned. Having done this, he has waived his privilege and must make a full disclosure.

*Brown v. Walker*, 161 U. S. 591, 597.

As to the time of filing a petition for the return of papers alleged to have been seized illegally, the cases at bar should be distinguished from *Gould v. United States*, 255 U. S. 298. It is there held that if a de-

fendant, *when first informed* that the Government has in its possession a paper illegally seized from him, moves forthwith for its return, such a motion does not come too late when first made at the trial of his case. In the present cases the appellants knew the Government was using the papers and courted such use. (R., p. 42.)

## VI.

**The Government is not under obligations to return the papers produced voluntarily.**

The affidavits of Assistant United States Attorney McGurk and Exhibit A (R., pp. 39-42) disclose that during the grand jury's investigation Kramer and one Louis S. Posner, attorney for the corporations, repeatedly requested permission for Kramer to appear before the grand jury. Kramer did appear before that body in May, 1922, and voluntarily produced documents, the return of which is now requested. This situation is clearly controlled by the decision in *Perlman v. United States*, 247 U. S. 7, where the rights of the Government were not as strong as they are here, for the reason that there the exhibits had been produced in a separate proceeding of a civil character. In *United States v. Hart*, 216 Fed. 374, the facts were one with the case at bar, and there the Government was sustained in its refusal to return the papers.

It is therefore respectfully submitted that the appeal and the writ of error should be dismissed, or the judgment of the district court affirmed.

JAMES M. BECK,

*Solicitor General.*

JOHN W. H. CRIM,

*Assistant Attorney General.*

CLIFFORD H. BYRNES,

*Special Assistant to the Attorney General.*

FRANCIS A. MCGURK,

*Assistant United States Attorney,*

*Southern District of New York.*

APRIL, 1923.







FILED

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# Supreme Court of the United States

OCTOBER TERM, 1922—No. 706.

ESSGEE COMPANY OF CHINA and  
DAVID SCHRATTER,  
*Plaintiffs-in-Error and Appellants,*

*against*

UNITED STATES OF AMERICA,  
*Defendant-in-Error and Appeller.*

Appeal From and in Error to the District Court of the  
United States for the Southern District of New York.

## Brief for Plaintiffs-in-Error and Appellants

W. M. K. OLCOTT,  
ABR. A. SILBERBERG,  
*Counsel for Appellants.*



# Supreme Court of the United States

OCTOBER TERM 1922.

ESSGEE COMPANY OF CHINA and  
DAVID SCHRATTER,  
Plaintiffs-in-Error  
and Appellants,

AGAINST

UNITED STATES OF AMERICA,  
Defendant-in-Error  
and Appellee.

No. 706

Appeal from and in error to the District Court  
of the United States, for the Southern Dis-  
trict of New York.

## BRIEF FOR PLAINTIFFS-IN-ERROR AND APPELLANTS.

### Statement.

The Essgee Company of China (a New York corporation) and David Schratter, the plaintiffs-in-error and appellants appeal from a final order and decree by which their application to compel the United States Attorney in and for the Southern District of New York, to return to them their books, records, and papers, etc., was denied (Rec., fols. 6-8).

The Essgee Company of China had its place of business in the City of New York, and dealt in straw goods and other merchandise (Rec., fol. 51). On October 14, 1921, *four* officers of the United States Customs Service, entered the corporation's place of business and asked for a Mr. Kramer and for Mr. David Schratter, one of the appellants (Rec., fol. 53).

One of the four officers, served Mr. Kramer with a subpoena *duces tecum*, entitled in a proceeding against Essgee Company of China, for the production (forthwith) before the Grand Jury of its books of account, its minute book, its invoices, its records and papers relating to all its dealings for a period of six years (Rec., fols. 164-172).

In keeping with the mandate of the subpoena, Kramer collected some of the books of account, the minute book, invoices and papers. Accompanied by two of the Government officials and by Schratter, Kramer proceeded with the books and papers to the Federal Building in the City of New York, where the Grand Jury was in session (Rec., fol. 54).

On arrival at the Federal Building, Kramer was escorted to a room which adjoins the room where the Grand Jurors met, and was told to leave the books, invoices and papers which he had with him with one of the customs officials, while he conferred with the Assistant United States Attorney (Rec., fol. 55).

Kramer so left the books, invoices and papers in the temporary custody of the customs official, and instead of a conference with the United States Attorney, was directed to present himself for arraignment under a warrant which had *theretofore* been issued against him (Rec., fol. 56). Kramer returned and demanded all

the books, invoices and papers which he had left in the custody of the customs official and was told that the papers would not be surrendered or returned to him or the Essgee Company of China (Rec., fol. 57).

All the books, invoices and papers produced pursuant to the mandate of the subpoena were seized by the Government officials before Kramer or any other officer of the Essgee Company of China was asked to produce them before the Grand Jury, and before Kramer or any other person was called as a witness pursuant to the subpoena which had been served (Rec., fol. 59).

The books, records, invoices and papers which were taken from Kramer, were used before the Grand Jury in the consideration of the charges which are included in the indictment which was returned against Essgee Company of China (Rec., fol. 58), although it never consented to such use (Rec., fols. 58-59). The United States Attorney, proposes to use the books, records and papers, so seized and taken upon the trial of the indictment (Rec., fol. 66).

The United States Attorney admitted that he had in his possession, a number of the books, records and papers which were produced by the Essgee Company of China, pursuant to the subpoena *duces tecum* which had been served upon one of its officers (Rec., fols. 235-239) and maintained that those books, etc., and the books, papers and records produced pursuant to another subpoena directed against Hanchaire Trading Corporation, comprised all the papers, books and records which he used and had (Rec., fol. 239).

The appellants contended in the District Court that to permit the United States Attorney to keep and to use the books, invoices and papers so taken from them without warrant in law,

would constitute an infraction of the rights which were secured to them by the Fourth and Fifth Amendments to the Constitution of the United States. That the taking and seizure of the books, invoices and papers constituted an unreasonable search and seizure of its books, invoices and papers. Also that by the taking of and the use of the same books, invoices and papers, the appellants were and will be compelled in a criminal cause to be witnesses against themselves.

District Judge Knox heard the application which the appellants made to compel the United States Attorney to return the books, records and papers so seized and taken from them, and considered that application together with a similar application which was made by Hanclore Trading Corporation which had offices in common with the Essgee Company of China.

The facts and circumstances which relate to the seizure of the books and papers of the Essgee Company of China are the same as the facts and circumstances which are fully stated in the appeal which is being prosecuted by the Hanclore Trading Corporation, and is No. 707 on the October Term 1922 Docket of this Court.

The assignments of error and the points argued in the Hanclore Trading Corporation appeal (No. 707 October 1922 Term) apply with equal force to the facts and circumstances which are included in the record in this cause.

The four customs officials when they came to the place of business of the Essgee Company of China, found that that company and the Hanclore Trading Corporation occupied the same offices. Separate subpoenas *duces tecum* were served. One subpoena was directed to the Hanclore Trading Corporation, and the other was

directed to the Essgee Company of China, the appellant in this case.

Both subpoenas were served upon the same person, a Mr. Kramer. He gathered the books, papers and records of both the Hanclore Trading Company and the Essgee Company of China, and took all of them to the Federal Building. There all the books, records and papers were seized at the same time and under the same circumstances.

There was no separation of facts or details in the seizure or the use of the books, records and papers of the Essgee Company of China or of the Hanclore Trading Corporation. We will for that reason not re-state the argument which we made in the *Hanclore Trading Corporation* case (October Term, No. 707) in support of the claims that the taking and the retention of the books, papers and records were unlawful and in violation of the protection secured to the Essgee Company of China by the Fourth and Fifth Amendments to the Constitution of the United States.

Every word which was included in the brief in the Hanclore Trading Corporation appeal (October 1922 Term No. 707) applies with equal force to the facts stated and set forth in the record which contains the proceedings instituted by and for Essgee Company of China (the case at bar). The difference is limited to the names of the two corporations. Each of the corporations (Hanclore Trading Corporation and Essgee Company of China) was subpoenaed. A number of each company's records and papers were brought to the Federal Building pursuant to the mandate contained in the subpoena. The persons subpoenaed were not summoned as witnesses. The parties subpoenaed were not called

upon to produce the books, records or papers. The parties subpoenaed were not afforded an opportunity to challenge the subpoena or to state or set forth any reason why the books should not be produced.

The books, records and papers of Essgee Company of China like the books, papers and records of the Hancloire Trading Corporation, were taken by one of the customs officials upon the statement that he would hold them while Kramer conferred with the Assistant United States Attorney. Instead of the conference, Kramer was directed to present himself for arraignment under a warrant which had *theretofore* been issued against him. The Assistant United States Attorney appeared upon the scene. The customs officials told him that the books, records and papers of each of the corporations were in the room. He, the Assistant United States Attorney asked no questions, and took all the books, records and papers and used them as a basis for the indictment which was returned against the Essgee Company of China.

We reiterate all that we have said in the brief submitted in the Hancloire Trading Corporation appeal (October Term 1922, No. 707) and conclude that for the reasons assigned in that brief, the Essgee Company of China is entitled to a surrender and return of the books, papers and records seized from it without warrant in law.

Respectfully submitted,

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ABR. A. SILBERBERG,  
Counsel for Appellants.